Supreme Court, U.S.
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No. 99-554

IN THE

Supreme Court of the United States

GOODYEAR TIRE & RUBBER COMPANY and
NATHANIEL WILLIE JEFFERSON BROCK,

Petitioners,

v.

TERESA VINSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
A. The Underlying Facts And Trial Proceedings.	1
B. Post Trial Proceedings.	2
Reasons for Denying the Writ and Misstatements of Applicable Alabama Law	3
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Alabama Power Co. v. Turner, 575 So.2d 551 (Ala. 1991), *cert. denied*, 500 U.S. 953 (1991) 5

All American Life and Casualty Co. v. Dillard, 255 So.2d 17, 287 Ala. 673 (1971) 5

BMW v. Gore, 517 U.S. 559 (1996) 7

BMW of North America, Inc. v. Gore, 701 So.2d 507 (Ala. 1997) 7

Brinkerhoff-Faris Trust Co. v. Hill 281 U.S. 673 (1930) 6

Chesser v. Mid-South Electrics, Inc., 652 So.2d 240 (Ala. 1994) 5

Cooley v. Knapp, 607 So.2d 146 (Ala. 1992), *cert. denied sub nom., Cooley v. Brown*, 507 U.S. 992 (1993) 5

Green Oil v. Hornsby, 539 So.2d 218 (Ala. 1980) . 7

Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986) 7

Henderson v. Alabama Power Co., 627 So.2d 828 (Ala. 1993) 8, 9, 10

Cited Authorities

	Page
Lindsey v. Normett, 405 U.S. 56 (1971)	7
Lowder Realty Co., Inc. v. Sabry, 542 So.2d 1240 (Ala. 1989)	5
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1996)	8
Professional Insurance Corp. v. Southerland, 700 So.2d 347 (Ala. 1997)	8
Rankin v. First National Bank, 437 So.2d 503 (Ala. 1993)	5
Saunders v. Shaw, 244 U.S. 317 (1917)	6, 7
State Department of Revenue, 590 So.2d 472 (Ala. 1991)	6
Wallace v. Doege, 484 So.2d 404 (Ala. 1986)	6
Statute:	
Ala. Code § 6-11-21	9
Rules:	
Ala. R. App. P. 5	8
Ala. R. App. P. 53(a)(1)	8
Ala. R. App. P. 53(a)(2)(F)	8

STATEMENT OF THE CASE

A. The Underlying Facts And Trial Proceedings.

In 1994, plaintiff's car and defendants' truck were traveling side by side on an Interstate when the defendants crossed over into her lane *twice* and forced her out of control into the path of a tractor/trailer on the other side of the highway headed in the opposite direction. (R-291-293). The testimony at trial showed that the driving of the defendants' truck was grossly negligent and wanton. Moreover, the evidence showed that Goodyear knew of this driver's reckless propensities. During the seven years prior to this incident this driver had received seven (7) traffic convictions and had also been involved in seven (7) accidents. (R-409). The State of Alabama had suspended his drivers license for excessive traffic violations. (R-437, 438). On two other occasions during this period he had been internally cited for "Recklessness and Gross Negligence while driving a company vehicle." (R-354). Goodyear's written driver's policy stated that, "a person's past driving history is indicative of future driving performance." (R-359,360). Goodyear acknowledged that as a fleet operator it had a duty to monitor, evaluate and train its drivers on safe driving practices. (R-360, 361). This driver testified that during his 19 years with the company he had *never* received any safe driver training whatsoever. (R-1112). His supervisor testified that he *should* have received some remedial driver safety training. (R-480). Goodyear's Home Office trial representative admitted that it was a matter of concern that a driver with this record had received no training despite company policy. (R-1160). Plaintiff's fleet safety expert, who had been a fleet safety consultant for the U.S. Postal Service in Chicago, testified that Goodyear had grievously violated

its own recognized duties and failed to enforce their policies on monitoring, evaluating and training drivers. (R-517-521). There was also evidence that this driver's company physicals said he was qualified to drive *only* if wearing corrective glasses but he was not wearing them at the time of this incident. (R-348 & 373). An in-court demonstration revealed that he could not read a sign without glasses but could easily read it with them. (R-1121). Despite all of this evidence of this driver's dangerous history and conduct on this particular occasion, Goodyear's trial representative testified that the company had handled this driver like all others and would do nothing differently again. (R-1164). All of this resulted in the plaintiff suffering terrible permanent injuries and incurring medical expenses of over $360,000. There was clearly evidence indicating wanton misconduct that justified the consideration and award of punitive damages. The jury verdict was $2 million in Compensatory Damages and $6 million in Punitive Damages.

B. Post Trial Proceedings.

After the jury trial and entry of judgment on the jury verdict, petitioners pursued post-trial motions including motions for new trial, motion for judgment as a matter of law, and motions for remittitur. None of these motions sought to have the trial court overrule the Alabama Supreme Court ruling in 1993 that the $250,000 cap on punitive damages was unconstitutional. The trial court denied the post-trial motions subject to the respondent accepting a remittitur and respondent filed a notice accepting remittitur to $2 million in Punitive Damages.

Petitioners appealed the denial of the post-trial motions to the Alabama Supreme Court. Respondent filed a cross-

appeal which challenged the remittitur. Oral argument was granted. The Alabama Supreme Court affirmed the trial court's order and thereby denied the petitioners' appeal, and denied the respondent's cross appeal which sought reinstatement of the damages awarded by the jury. Petitioners filed an application for rehearing to the Alabama Supreme Court which was denied. Petitioners then filed this application for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT AND MISSTATEMENTS OF APPLICABLE ALABAMA LAW

The entire basis of the petitioners' request for a writ of certiorari is the statement "Were this judgment the result of fair and judicial processes, the case would present no basis for this Court's review. But the judgment is instead the result of an aberrational process of appellate review that on its face violates basic due process principles." This brief will first address and demonstrate that the judgment below was indeed the result of fair and regular judicial process and then demonstrate that there was no aberrational process of appellate review.

On the issue of fair and regular judicial process, it is uncontested that both pre-trial discovery and the jury trial itself were conducted pursuant to "fair and regular judicial process." After the jury verdict and entry of judgment, the petitioners were afforded post-trial review on all issues raised in their post-trial motions; granted a $4 million remittitur to $2 million of the original $6 million punitive damage award; afforded an appeal to the Alabama Supreme Court which included oral argument; and pursued an application for rehearing into that court. Respondent suggests that such a

background hardly suggests a lack of fair and regular judicial process.

Next, the petitioners' assertion "the decision below violates the due process clause by changing Alabama law to erect a new and unforeseeable barrier to appellate review" simply is without merit. In fact, the petitioners' position appears only to be an attempt to excuse their failure to comply with the long-standing rule that a party must make a record in the trial court in order to assert error on appeal. Petitioners filed very detailed post-trial motions including motions for new trial which set out 46 specific grounds, motions for judgment as a matter of law which listed 45 specific grounds, and motions for remittitur citing 45 specific grounds. (C-315-358). Yet, it is undisputed that the petitioners did not even mention the previously invalidated statutory cap in any of their post-trial motions, nor did they request that the punitive damage award be remitted to the $250,000 cap.[1] Rather, the petitioners claim that merely reciting the statutory cap in an answer properly preserved the issue for appeal, even though it did not require a ruling by the trial court. By way of their post-trial motions, the petitioners were in complete control of what issues would be subject to post-trial review and made the decision not to make the statutory cap an issue.

Alabama has long recognized that alleged error must be raised in a post-trial motion to be preserved on appeal.

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1. Respondent objects to footnote 2 in petitioners' brief which makes reference to an alleged statement by the trial judge in an unrelated case which is not part of the record in this case. The mere reference to this alleged statement, as well as the insertions in brackets to add further unsupported interpretations, is inappropriate and without justification.

Lowder Realty Co., Inc. v. Sabry, 542 So.2d 1240, at 1242 (Ala. 1989). Even prior to the adoption of the *Alabama Rules of Civil Procedure* and *Alabama Rules of Appellate Procedure* which are patterned after the Federal Rules, Alabama recognized that "Assignments of Error which do not refer to any ruling of the trial judge will not be considered on appeal." *All American Life and Casualty Co. v. Dillard*, 255 So.2d 17, 287 Ala. 673 (1971). Alabama, like other jurisdictions, has consistently recognized that a trial court cannot be found in error absent an adverse ruling constituting error. *E.g. Chesser v. Mid-South Electrics, Inc.*, 652 So.2d 240 (Ala. 1994); *Cooley v. Knapp*, 607 So.2d 146, 148 (Ala. 1992), *cert. denied sub nom.*, *Cooley v. Brown*, 507 U.S. 992 (1993); *Alabama Power Co. v. Turner*, 575 So.2d 551, 553 (Ala. 1991), *cert. denied*, 500 U.S. 953 (1991). Petitioners failed to raise this issue in their post-trial motions and failed to obtain any adverse ruling, therefore they cannot pursue an appeal on this issue.

None of the Alabama cases cited by the petitioners excuse a party from obtaining an adverse ruling in order to assert error on appeal. In fact, the petitioners clearly misstate the holdings or the effect of the decisions cited in their brief. For example, in their brief petitioners cite *Rankin v. First National Bank*, 437 So.2d 503 (Ala. 1993) for the proposition, "The rationale for this was once that an issue had been raised in a parties pleadings and argued, no unfairness would result from allowing that party to pursue the issue on appeal." *Rankin* does not stand for the proposition that once an issue has been raised in a pleading, it can be pursued on appeal. *Rankin* simply held that a party cannot rely on a theory of recovery for first time on appeal. *Rankin*, at 506.

The other Alabama cases cited by the petitioners are thoroughly discussed and distinguished by LYONS, Justice in his concurring opinion on application for rehearing. (Appendix D to the Petition). That opinion recognizes that *Wallace v. Doege*, 484 So.2d 404 (Ala. 1986) "expressly refers to the trial court's refusal to hear the limitations defense when it was presented at the close of all the evidence." (Appendix 26a). Likewise, in discussing *ex parte State Department of Revenue*, 590, 595 So.2d 472 (Ala. 1991) the concurring opinion correctly noted that the trial court had declined to address a constitutional issue; contrasted with the record in the present case which did not support a conclusion that the trial court refused to apply the cap statute.

The petitioners' due process argument relies primarily on this Court's decisions in *Brinkerhoff-Faris Trust Co. v. Hill* 281 U.S. 673 (1930) and *Saunders v. Shaw*, 244 U.S. 317 (1917). However, a review of those cases clearly distinguishes the present case from those decisions because the petitioners here were granted every opportunity to be heard and present a defense. In *Brinkerhoff-Faris*, the Court stated: "The practical effect of the judgment in the Missouri court is to deprive the plaintiff of property without affording it *at any time* an opportunity to be heard in its defense." 281 U.S. at 678. Further, this Court stated: "Whether acting through its judiciary or its legislature, a state may not deprive a person of *all existing remedies* for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682. (Emphasis added). Unlike the plaintiff in *Brinkerhoff-Faris*, the petitioners were granted "an opportunity to be heard in its defense" at every stage of the proceedings below. In addition, the petitioners certainly were not deprived "of all existing remedies for the enforcement

of a right." Likewise, in *Saunders*, this Court found a deprivation of due process "because the case has been decided against [the defendant] without his ever having had the opportunity to present his evidence." *Saunders*, at 318.

As stated in the petition, the petitioners assert "the decision below violates the due process clause by changing Alabama law to erect a new and unforeseeable barrier to appellate review." However, "This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a state to provide appellate review." *Lindsey v. Normett*, 405 U.S. 56 (1971) (citing numerous other decisions). This petition does not contend that the petitioners failed to receive "a full and fair trial on the merits." In fact, it is important to recognize that the trial court conducted a post-verdict review of the punitive damages as set forth in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986); *Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1980); *BMW of North America, Inc. v. Gore*, 701 So.2d 507 (Ala. 1997) ("BMW II"). The trial court's order is Appendix C to the petition. The trial court went through a lengthy analysis of the evidence and findings pursuant to those decisions, as well as the important "guide posts" established by this Court in *BMW v. Gore*, 517 U.S. 559 (1996). Despite the fact that this case involves "indifference to or reckless disregard for the health and safety of others, as opposed to mere economic harm" (*Id.* at 568), the trial court remitted the $6 million punitive damage award to $2 million. Therefore, the trial court reduced the ratio of punitive damages to compensatory damages from 3:1 to 1:1. Given the full and fair trial afforded to the petitioners, as well as the post verdict review and remittitur, it is indeed difficult to understand how the

petitioners claim they were denied an opportunity to be heard and present defenses.

It should also be noted that the unanimous ruling by the Alabama Supreme Court below pursuant to Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P. shows the court, after a review of the record and contentions of the parties, found that the judgment or order was entered without an error of law. This ruling provides "appellate review [that] makes certain the punitive damages are reasonable in their amount and rationale in light of their purpose to punish what has occurred and to deter repetition." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 at 20-21 (1996). The discussion of *Henderson* and whether the issue of the statutory cap was preserved for appeal, is contained only in a limited number of concurring opinions to the unanimous decision

As pointed out by LYONS, Justice (concurring) the petitioners had available Rule 5 (Ala. R. App. P.) which would have allowed the trial court considering a motion to make a ruling adverse to the party yet consistent with precedent and at the same time allow for an interlocutory appeal. *See, e.g., Professional Insurance Corp. v. Southerland*, 700 So.2d 347 (Ala. 1997). In addition, the concurring opinion also correctly recognizes that it would be "anomalous to reverse a trial court's order on a ground the trial court was never asked to consider." (Appendix 25a).

The legislative attempt to impose a statutory cap on punitive damages was invalidated by the Alabama Supreme Court on state constitutional grounds in 1993. *Henderson v. Alabama Power Co.*, 627 So.2d 828 (Ala. 1993). Therefore, at all times pertinent to this cause, including the motor vehicle incident itself, as well as all court proceedings, the authority

of *Henderson* has remained the law in Alabama. Contrary to the assertion made by the petitioners, a majority of the Justices of the Alabama Supreme Court have not indicated their disagreement with *Henderson* and their inclination to overrule it. At most, it can only be fairly stated that some of the Justices have expressed a possible desire to revisit the *Henderson* decision. In addition, the statutory cap on punitive damages contained in Ala. Code § 6-11-21 contained several exceptions to the statutory cap, which would have allowed recovery over the statutory cap in this case. Since this was not raised in post-trial motions the respondent did not address these exceptions and the fact that this record would clearly have allowed the same verdict even if the cap had still been in place. It is illogical to overlook this important consideration simply by the strategy of Petitioners in not raising these issues at post-trial motion proceedings and now claiming the Alabama procedural process is constitutionally infirm in this Petition.

The Alabama Legislature passed new legislation which became effective June 7, 1999 which limits punitive damage awards to three times the compensatory damages of the party claiming punitive damages or $500,000 whichever is greater. Therefore, under this new legislation, neither the original punitive damage award, nor the remitted punitive damage award would be subject to the statutory cap but would still be subject to post-trial review according to the "guide posts" enumerated by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied as the petitioners were provided due process at every stage of the proceedings below. The strategic decision not to address the overruling of *Henderson* in post-trial motions cannot be allowed to give the petitioners the ability to raise an issue on appeal that they intentionally avoided raising on post-trial motion.

Respectfully submitted,

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